STATE OF MICHIGAN

COURT OF APPEALS

JERRELL O. NOLEN,

Plaintiff-Appellee,

v

KRYSTAL NOLEN, a/k/a KRYSTAL REDEN,

Defendant-Appellant.

UNPUBLISHED
June 26, 2007

No. 271111
Wayne Circuit Court
Family Division
LC No. 02-214833-DM

Before: Bandstra, P.J., and Zahra and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's custody order and the order denying disqualification of the trial court judge. We affirm.

Defendant gave birth to the minor child, Jerrell O. Nolen, Jr., on April 15, 1999, in Chicago, married plaintiff in October 1999, and moved to the Detroit area in November 1999. In June 2001, the parties separated, and defendant moved back to Chicago with the child. After the date of separation, the parties disputed the predominant residence of the child. Defendant asserted that she allowed the child to live with plaintiff while she completed her master's degree. However, plaintiff asserted that defendant completed her master's degree, and the child nonetheless remained in his care. At that time, there were no orders governing child custody.

On May 2, 2002, plaintiff filed a complaint for divorce, seeking joint legal and physical custody. After defendant did not respond to the complaint for divorce, plaintiff filed a notice of default and entry of default. However, in the default judgment of divorce, plaintiff sought sole legal and physical custody of the child, and the trial court entered the default judgment. The trial court denied defendant's motion to set aside the default judgment of divorce and would not hold a hearing regarding the best interests of the child. On appeal, we reversed the trial court's denial of the motion to set aside the default judgment of divorce with regard to the custody issue and ordered an evidentiary hearing to determine the best interests of the child in accordance with MCL 722.23.[1] Following the evidentiary hearing, the trial court ruled that the minor child had

[1] *Nolen v Nolen*, unpublished opinion per curiam of the Court of Appeals, issued August 11, (continued…)

an existing custodial environment with both parents, and clear and convincing evidence did not demonstrate that a change was in the best interest of the child. Therefore, the trial court awarded joint legal and physical custody of the minor child. Defendant appeals as of right from the trial court's decision.

Defendant first argues that the trial court abused its discretion in awarding joint custody. We disagree.

MCL 722.28 provides that child custody orders and judgments shall be affirmed on appeal unless the trial court made "findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue." A finding of fact is against the great weight of the evidence if the evidence "clearly preponderates in the opposite direction." *Fletcher v Fletcher*, 447 Mich 871, 878; 526 NW2d 889 (1994), quoting *Murchie v Standard Oil Co*, 355 Mich 550, 558; 94 NW2d 799 (1959). This Court reviews the trial court's discretionary rulings, including custody decisions, for an abuse of discretion. *Fletcher*, *supra* at 879-881. We review questions of law for clear legal error, which occurs when a court incorrectly chooses, interprets, or applies the law. *Id.* at 881.

In light of the trial court's holding that an established custodial environment existed with both parties, clear and convincing evidence was required to show that a change was in the child's best interests. MCL 722.27(1)(c); *Brown v Loveman*, 260 Mich App 576, 585; 680 NW2d 432 (2004). The trial court found that neither party had presented clear and convincing evidence that would warrant a change in the established custodial environment and awarded joint legal and physical custody.

If a party requests joint custody, the trial court is obligated to consider it and must state, on the record, the reasons for granting or denying the request. MCL 722.26a(1); *Shulick v Richards*, 273 Mich App 320, 326; 729 NW2d 533 (2006). In determining whether joint custody is in the best interest of the child, the trial court must consider the best interest factors of MCL 722.23. MCL 722.26a(1). To determine the best interests of the child in custody disputes, a trial court must make specific findings of fact regarding each of the twelve factors set forth in MCL 722.23. *MacIntyre v MacIntyre (On Remand)*, 267 Mich App 449, 451-452; 705 NW2d 144 (2005); *Thompson v Thompson*, 261 Mich App 353, 356-357; 683 NW2d 250 (2004); *McCain v McCain*, 229 Mich App 123, 124; 580 NW2d 485 (1998). The trial court is not required to weigh the statutory best interest factors equally. *McCain*, *supra* at 131. The welfare of the child is always the overwhelmingly predominant factor. *Id.* at 130-131.

Defendant challenges the trial court's factual findings regarding the statutory best interest factors, MCL 722.23(a), (b), (c), (d), (g), (h), (j), (k), and (l). Regarding factor (a), the trial court found the parties equal and stated that both parties loved the child and had a bond with him. The evidence showed that both parents loved the child and maintained a close relationship with him. Katherine Stathos, a family therapist who had been treating the child and defendant in Chicago, found that defendant's parenting style was very direct and warm and the child responded well to defendant. Therefore, the evidence does not clearly preponderate in the opposite direction of the

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2005 (Docket No. 261029).

trial court's finding that the parties were equal on this factor, and this finding is not against the great weight of the evidence.

The trial court found that factor (b) favored plaintiff and stated that both parties had the capacity and disposition to give the child love and affection and guide him and continue his education and religion. The trial court found that both parties were diligent with the child's education and homework. The evidence showed that both parties were raising the child in his religion and participated in church and religious activities. It is undisputed that, whatever the reason, defendant voluntarily gave up custody of the child from October 2002 through June 2003. Both parties claimed to be involved with the child's school and homework and able to transport the child to and from school. Defendant's challenge to the trial court's consideration of academic achievement under this factor is meritless because MCL 722.23(b) specifically instructs the trial court to consider the parties' capacity and disposition to continue the child's education.

Defendant asserted that factor (b) favored her because of the use of corporeal punishment by plaintiff and his wife. However, plaintiff and his wife asserted that they had stopped using that type punishment for over a year and were responding to the minor child's temper tantrums. Nonetheless, the trial court did not find in defendant's favor on this factor. Trial courts, which are more experienced and better situated to weigh evidence and assess credibility, are in a superior position to make accurate decisions about which custody arrangement will be in the child's best interests. *Fletcher*, *supra* at 890. Therefore, the evidence does not clearly preponderate in the opposite direction of the trial court's finding that this factor favored plaintiff, and this finding is not against the great weight of the evidence.

The trial court found the parties equal with respect to factor (c) and stated that both parties had the capacity and disposition to provide for the child. The evidence showed that plaintiff did not send the child to visit defendant in good clothes because he dressed the child in play clothes. Plaintiff provided the child with medical insurance. Plaintiff failed to take the child in November 2003 to see a doctor as defendant requested. Although plaintiff did not spend the night at the hospital during the child's surgery, he visited and spoke with the nurses and doctors, and defendant was there the entire time. However, his partial attendance at the hospital was explained by the parties' antagonistic relationship. Both parties were available to transport the child to and from school. Therefore, the evidence does not clearly preponderate in the opposite direction of the trial court's finding that the parties were equal on this factor, and this finding is not against the great weight of the evidence.

The trial court found that factor (d) slightly favored plaintiff and that the child had lived with plaintiff on and off since 1999 and exclusively from October 2002 until May 2003. The evidence shows that the child lived with defendant until June 2001 and with plaintiff from October 2002 until May 2003. The child lived with defendant during the summer of 2003 and returned to plaintiff in August or September 2003. Defendant moved from her mother's residence to the home of Lance Thomas, her fiancé, in October 2002, relocated to Warren in August 2004, and returned to Chicago in October 2004. Plaintiff lived with Della Nolen, his mother, from the time the child was born until plaintiff moved into his own house in Detroit. Plaintiff moved in with his wife, Ozenia, and her two children in February 2004, and defendant lived with Thomas, to whom she was engaged but with whom she had not yet set a wedding date. Although both parties had moved several times, the evidence supports the trial court's finding

that this factor favored plaintiff slightly, and this finding is not against the great weight of the evidence.

The trial court found the parties equal on factor (g). The evidence showed that both parties were in good physical health and had no emotional or mental problems. Therefore, the evidence does not clearly preponderate in the opposite direction of the trial court's finding that the parties were equal on this factor, and this finding is not against the great weight of the evidence.

The trial court found the parties equal on factor (h). The evidence showed that the child was doing well in school and had made the honor roll for the first grade. Both parties were involved in the child's education, and defendant had enrolled the child in Spanish day camp and karate during the summer. Both parties involved the child in activities, and he had friends near both parties' homes. Therefore, the evidence does not clearly preponderate in the opposite direction of the trial court's finding that the parties were equal on this factor, and this finding is not against the great weight of the evidence.

The trial court found that factor (j) favored neither party. The evidence showed that, although the parties claimed that they were willing to facilitate a relationship between the child and the other party, they both complained that the other denied telephone calls to the child during parenting time. Defendant claimed that plaintiff would not wait for her to catch up with him on the freeway when construction traffic delayed her arrival at a parenting time exchange in 2005, and plaintiff was late once in 2005 and she did not wait for him. Plaintiff admitted that he had refused to wait for defendant when she was late on another occasion. Therefore, the evidence does not clearly preponderate in the opposite direction of the trial court's finding that this factor favored neither party, and this finding is not against the great weight of the evidence.

The trial court found that factor (k) favored neither party. The evidence showed that, in response to defendant pointing her finger in plaintiff's face and insulting him, plaintiff bit her finger, which resulted in a domestic violence charge. Defendant claimed that plaintiff also threw a snowball at her and tried to punch her, but plaintiff denied these allegations. Regarding an incident at the child's school, defendant claimed that she was there for a meeting with the principal and had unintentionally driven down plaintiff's street. Ozenia asserted that she arrived at the school and saw defendant trying to leave with the child when it was not her parenting time. Ozenia claimed that defendant had threatened her in August 2004, and had placed harassing telephone calls to her. We acknowledge that the evidence regarding the incident at the child's school conflicts. However, trial courts, which are more experienced and better situated to weigh evidence and assess credibility, are in a superior position to make accurate decisions about which custody arrangement will be in the child's best interests. *Fletcher*, *supra* at 890. Therefore, the evidence does not clearly preponderate in the opposite direction of the trial court's finding that this factor favored neither party, and this finding is not against the great weight of the evidence.

The trial court found that, with respect to child support, factor (l) favored plaintiff because defendant's payment to plaintiff supported plaintiff's position that the custody arrangement was intended to be permanent. Regarding the child's relationship with Ozenia's son, the trial court found that this factor favored neither party because Ozenia supervised the children and the child was not afraid of Ozenia's son. With respect to the child's temper tantrums during parenting time exchanges, the trial court found that this factor favored neither

party because they did not occur during every exchange and there was no evidence that they began during the period when plaintiff had the child from October 2002 until May 2003.

Regarding child support, the evidence showed that defendant paid plaintiff child support from October 2002 until May 2003 and plaintiff paid defendant child support at other times. Regarding issues with Ozenia's son, the evidence showed that he had unintentionally slammed a door on the child's hand and the boys played with toy guns and a plastic knife. Although the boys "got into it at times," the child had stood up to Ozenia's son. With respect to the child's temper tantrums, they occurred frequently during parenting time exchanges, necessitating plaintiff's physical removal of the child from defendant's vehicle. Plaintiff believed that defendant coached the child to cry during exchanges, and defendant sometimes cried during the exchanges as well. There was no indication when the temper tantrums began. Therefore, the evidence does not clearly preponderate in the opposite direction of the trial court's finding that this factor favored neither party, and this finding is not against the great weight of the evidence.

In determining whether joint custody is in the child's best interest, the trial court must also consider "[w]hether the parents will be able to cooperate and generally agree concerning important decisions affecting the welfare of the child." MCL 722.26a(1).

> In order for joint custody to work, parents must be able to agree with each other on basic issues in child rearing—including health care, religion, education, day to day decision-making and discipline—and they must be willing to cooperate with each other in joint decision-making. If two equally capable parents whose marriage relationship has irreconcilably broken down are unable to cooperate and to agree generally concerning important decisions affecting the welfare of their children, the court has no alternative but to determine which parent shall have sole custody of the children. The establishment of the right to custody in one parent does not constitute a determination of the unfitness of the noncustodial parent but is rather the result of the court's considered evaluation of several diverse factors relevant to the best interests of the children. [*Fisher v Fisher*, 118 Mich App 227, 232-233; 324 NW2d 582 (1982) (citations omitted).]

Both parties are attentive to the child's medical needs. Defendant took the child to the doctor for checkups and immunizations. Although plaintiff did not fulfill plaintiff's request to take the child to a doctor in December 2003, before his heart condition was diagnosed, both parties were present at the hospital when surgery or other hospitalization was required. The child attends church and says prayers with both parents, and there is no evidence of an inability to cooperate or generally agree on decisions regarding religion. Both parties are involved with the child's education, and there is no evidence of an inability to cooperate or generally agree on decisions regarding education. Although plaintiff and Ozenia had used corporeal punishment in the past, both claimed that they had not done so for a year. The parties have been using text messaging to communicate. While this may not be the preferred method of communication, it does not demonstrate an inability to cooperate. Although the parties have had several disagreements and misunderstandings or miscommunications regarding parenting time, the evidence does not clearly preponderate in the opposite direction of a finding that the parties "will be able to cooperate and generally agree concerning important decisions affecting the welfare of the child." MCL 722.26a(1). Because none of the challenged findings regarding the best interest

factors or the parties' ability to communicate were against the great weight of the evidence, the trial court did not abuse its discretion in awarding joint legal and physical custody.

Defendant argues that the chief judge abused her discretion in denying defendant's motion to disqualify the trial judge. We disagree. This Court reviews the chief judge's decision regarding a motion for disqualification pursuant to MCR 2.003 for an abuse of discretion. *Meagher v Wayne State Univ*, 222 Mich App 700, 725; 565 NW2d 401 (1997). However, we review de novo constitutional questions, including a trial court's determination regarding whether a party was denied due process. *York v Civil Service Comm*, 263 Mich App 694; 699, 689 NW2d 533 (2004).

MCR 2.003(B)(1) provides that a judge is disqualified when she cannot impartially hear a case, including but not limited to instances in which the judge "is personally biased or prejudiced for or against a party or attorney." One who seeks to disqualify a judge on the basis of bias or prejudice must overcome a heavy presumption of judicial impartiality. *Cain v Dep't of Corrections*, 451 Mich 470, 497; 548 NW2d 210 (1996). MCR 2.003(B)(1) requires a showing of actual and personal bias or prejudice. *Id.* The bias or prejudice requirement means that disqualification is not warranted unless the bias is both personal and extrajudicial, i.e., that its origin is in events or sources of information gleaned outside the judicial proceeding. *Id.* at 495-496. Although an unfavorable predisposition that derives from the facts or events of the current proceeding may be characterized as a bias or prejudice, it will not constitute a basis for disqualification unless it displays "'a deep-seated favoritism or antagonism that would make fair judgment impossible.'" *Id.* at 496, quoting *Liteky v United States*, 510 US 540, 555; 114 S Ct 1147; 127 L Ed 2d 474 (1994).

Defendant relies in part on the trial court's entry of a default judgment and her findings regarding two best interest factors. However, repeated rulings against a party, no matter how erroneous, or vigorously or consistently expressed, are not disqualifying. *Wayne Co Prosecutor v Parole Bd*, 210 Mich App 148, 155; 532 NW2d 899 (1995). Rather, defendant must demonstrate that the judge would be unable to rule fairly given her past comments or expressed views. Nothing in the record supports a finding that the trial judge harbored a deep-seated favoritism or antagonism or could not put her previous rulings out of her mind. Moreover, the trial judge did not make any comments on the record indicating any expressed bias or any extrajudicial prejudice. Therefore, defendant has not met the MCR 2.003(B)(1) standard required to disqualify a judge.

Defendant also challenges the decision regarding judicial disqualification on due process grounds. The Due Process Clause requires an impartial and unbiased decision maker. *Cain, supra* at 497. A judge may be disqualified if "'the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.'" *Id.* at 498, quoting *Crampton v Dep't of State*, 395 Mich 347, 356; 235 NW2d 352 (1975). The *Crampton* Court provided the following examples of situations where that risk of actual bias is too high: (1) the judge has a pecuniary interest in the outcome, (2) the judge has been the target of personal abuse or criticism from the party before her, (3) the judge is enmeshed in other matters involving the party, and (4) the judge may have prejudged the case because of her prior participation as an accuser, investigator, fact finder or initial decision maker. *Cain, supra* at 498; *Crampton, supra* at 351. Analysis of due process disqualification issues "requires a case-by-case determination of when the risk of actual bias is too prevalent, so that the constitutional guarantee of a fair trial

would be inhibited." *Cain*, *supra* at 514. However, only under extreme circumstances does due process require judicial disqualification, and none of the above situations is alleged in the instant case. *Id.* at 498.

Defendant claims that the trial judge stated that she would not allow a change of domicile and would not allow the child to move to Illinois and defendant should come to Michigan so that she could raise her child. Defendant complains that the trial court stated that the default had been entered as a result of defendant's negligence and a lot of time and money had been wasted because of defendant's decisions. Defendant also cites the trial court's findings regarding plaintiff's actions at parenting time exchanges and his actions with respect to the child's medical care. Even assuming that each of these assertions or allegations is accurate, defendant has failed to demonstrate that the risk of actual bias was so prevalent that her constitutional guarantee of a fair trial would be inhibited. None of these allegations rises to the level of involvement or interaction a judge has in the situations provided in *Crampton*, goes beyond a judge's professional involvement in a case, or includes an element of abuse of authority or intent to harm a party. Further, as stated, *supra*, repeated rulings against a party, no matter how erroneous, or vigorously or consistently expressed, are not disqualifying. *Wayne Co Prosecutor*, *supra* at 155. Therefore, reversal is not warranted on this ground.

In her reply brief, defendant argues that the trial court erred in its determination that there was an established custodial environment with both parties. Defendant maintains that the established custodial environment exists with her, rather than with both parties, because the child looks to her first for guidance, discipline, the necessities of life, and parental comfort and is more comfortable in her care. Defendant mischaracterizes the required analysis regarding whether an established custodial environment has been established; there is no consideration given to which party to whom the child looks first for these items or with whom the child is more comfortable. See MCL 722.27(1)(c); *Foskett v Foskett*, 247 Mich App 1, 5; 634 NW2d 363 (2001). The evidence showed that the child had a close relationship with both parties and looked to both parties for guidance regarding religion, education, discipline, medical necessities, and comfort. Defendant shared an apartment with Thomas, and plaintiff lived in a house with Ozenia and her two children. Therefore, taking into account the child's age, the physical environment, and the inclination of the custodian and the child regarding the permanency of the relationship, we agree with the trial court that the child naturally looked to both parties for guidance, discipline, the necessities of life, and parental comfort. See MCL 722.27(1)(c); *Foskett*, *supra*. It cannot be said that the evidence clearly preponderates in the opposite direction of the trial court's finding that an established custodial environment existed with both parties.

Defendant also challenges the trial court's factual findings regarding factor (e). MCL 722.23(e) focuses on the "permanence, as a family unit, of the existing or proposed custodial home or homes." The trial court found that this factor favored plaintiff. Factor (e) concerns the permanence of the custodial home, as opposed to its acceptability. *Ireland v Smith*, 451 Mich 457, 464; 547 NW2d 686 (1996). At the time of the hearing, defendant was living with Thomas but had not yet set a wedding date. Plaintiff had lived with Ozenia and her two children since February 2004. It is undisputed that, for whatever reason, defendant voluntarily gave up custody of the child from October 2002 through June 2003.

Defendant asserts in her reply brief that, since the trial, she and Thomas have married, which affects the analysis regarding factor (e). First, assuming that this assertion was proper

evidence, this constitutes an improper expansion of the record on appeal. See MCR 7.210(A)(1); *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 56; 649 NW2d 783 (2002). Second, this Court must review the trial court's findings, which were based on the evidence before it and did not include defendant's nuptials. Third, even assuming that it was proper for this Court to consider defendant's recent marriage, trial courts are more experienced and better situated to weigh evidence and assess credibility and are in a superior position to make accurate decisions about which custody arrangement will be in the child's best interests. *Fletcher*, *supra* at 890. We are not convinced that this marriage would warrant a conclusion that a finding in favor of plaintiff on this factor was against the great weight of the evidence. Last, this evidence would be more appropriately presented to the trial court in a motion to change custody, alleging that it creates a proper cause or change of circumstances. Therefore, the evidence does not clearly preponderate in the opposite direction of the trial court's finding that factor (e) favored plaintiff, and this finding is not against the great weight of the evidence.

Affirmed.

/s/ Richard A. Bandstra
/s/ Brian K. Zahra
/s/ Karen M. Fort Hood